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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 NEVADA WEST PETROLEUM, LLC, et al.,  
8 Plaintiffs,  
9 v.  
10 BP WEST COAST PRODUCTS, LLC, et al.,  
11 Defendants.

Case No. 2:15-cv-01684-APG-PAL

ORDER

12 This matter is before the court on defendants' Application for Attorney's Fees and Costs  
13 (ECF No. 63). The court has considered the application, Supporting Memorandum (ECF No. 64),  
14 plaintiff's response (ECF No. 68), defendant's Reply (ECF No. 71) and the arguments of counsel  
15 at the hearing held January 31, 2017.

16 **BACKGROUND**

17 The Complaint (ECF No. 1) was filed September 1, 2015. It is a lawsuit for damages  
18 arising out of alleged bad faith practices by and on behalf of petroleum franchisors/refiners  
19 defendants BP West Coast Products, LLC, Tesoro Refining & Marketing, and Treasure Franchise  
20 Company. Plaintiffs assert claims for violations of the Petroleum Marketing Practices Act, 15  
21 U.S.C. § 2801 et. seq.; breach of contract; breach of the covenant of good faith and fair dealing;  
22 and civil conspiracy.

23 The court entered a Discovery Plan and Scheduling Order (ECF No. 30) which initially  
24 established an August 25, 2016 discovery cutoff, and other case management deadlines consistent  
25 with LR 26-1. On August 8, 2016, defendants filed a Motion to Strike Plaintiff's Expert Report  
26 (ECF No. 37), and Motion to Compel Discovery (ECF No. 39). The court set the matters for  
27 hearing on September 30, 2016. After hearing arguments of counsel, the court granted in part and  
28 denied in part defendants' motion to compel. Plaintiffs' boiler plate objections were overruled and

1 stricken, and supplemental responses fully compliant with Rule 34(b)(2)(B) & (C) were  
2 compelled. The court also required that the supplemental response indicate whether any  
3 responsive documents were being withheld on the grounds of privilege, and required plaintiffs to  
4 produce a privileged document log for any withheld documents. The court overruled plaintiffs'  
5 work product objections.

6 With respect to the motion to strike plaintiffs expert, the court gave the plaintiffs two weeks  
7 in which to serve a fully compliant Rule 26(a)(2)(B) report. The court continued the hearing,  
8 reserving decision on whether the expert report should be stricken, and what, if any, additional  
9 sanctions should be imposed. However, the court's oral ruling made it clear that at a minimum, if  
10 the plaintiffs produced a completely compliant expert report, plaintiffs' counsel would be  
11 responsible for the costs of opposing counsel deposing the expert as well as reasonable costs and  
12 attorney's fees incurred in filing the motion to compel.

13 A status conference was set for October 18, 2016, to address plaintiffs' compliance with  
14 the court's order. The parties filed a Joint Status Report (ECF No. 58) on October 13, 2016, as  
15 directed. The supplemental status report advised the court that plaintiffs had served a supplemental  
16 expert disclosure; supplemental responses to defendants' first request for production of documents;  
17 a ninth supplemental Rule 26(a) witness and document disclosure, along with corresponding  
18 documents as part of plaintiffs' responses to defendants' document requests.

19 Defendants continued to complain about deficiencies with plaintiffs' supplemental expert  
20 report prepared by Mr. Santicola on several grounds, and argued that the supplemental report  
21 should also be stricken for various reasons. Defendants also complained about the adequacy of  
22 defendants' supplemental responses to requests for production the court compelled plaintiffs to  
23 produce.

24 Plaintiffs responded to defendants' objections arguing that the objections about Mr.  
25 Santicola's opinions went to the weight and credibility of his opinions rather than to the  
26 admissibility of his report. With respect to the supplemental responses to requests for production  
27 of documents, plaintiffs stated that they had identified documents in their care, custody and control  
28 they intended to rely upon to support their damages claim, including more than 1,000 pages of

1 detailed records regarding the financial operation of their stations which came from the defendants'  
2 own system. Plaintiffs also produced financial statements from the plaintiff entities, including  
3 revenue and expense information which Mr. Santicola used to develop a detailed calculation of the  
4 plaintiffs' damages. In addition, plaintiffs provided copies of their monthly bank statements,  
5 cancelled checks, and offered to produce their electronic bookkeeping file for the defendants'  
6 inspection if requested. Counsel for plaintiffs also represented that any other responsive tax returns  
7 that had not been produced or filed after plaintiffs initially produced previous returns would be  
8 obtained and produced immediately.

9 At the October 18, 2016 hearing, the court required the parties to meet and confer in an  
10 effort to agree upon reasonable costs and attorneys' fees as sanctions for the necessity of filing the  
11 motion to compel. The court indicated that if the parties were able to reach an agreement regarding  
12 the amount of reasonable costs and attorneys' fees, they should file a stipulation reflecting the  
13 agreed-upon amount. The court set a deadline to file an application for fees and costs and  
14 plaintiffs' response.

15 As a sanction for plaintiffs' failure to timely serve a Rule 26(a)(2)(B) compliant expert  
16 report the court ordered that plaintiffs would be responsible for the costs of making Mr. Santicola  
17 available for a deposition. Specifically, the court ordered that plaintiffs would incur Mr.  
18 Santicola's expert fees for appearing for and preparing for his deposition, court reporter fees, and  
19 the cost of an original and one copy of the transcript. The court required the deposition to be  
20 scheduled within 30 days of the hearing.

21 Finally, because plaintiffs' expert report's damages opinions were at odds with testimony  
22 of plaintiffs' Rule 30(b)(6) designee the court also required counsel for plaintiffs to supplement  
23 their damages calculation to clarify the damages position of their client, and gave defendants 30  
24 days after the date of plaintiffs' expert deposition to disclose a rebuttal expert. The Motion to  
25 Strike (ECF No. 37) was denied without prejudice to filing a motion in limine before trial  
26 challenging the admissibility of plaintiffs' expert's opinions.

27 The parties were unable to agree on reasonable costs and attorneys' fees incurred for filing  
28 the motion to compel. Counsel for defendants filed an Application for Attorneys' Fees and Costs

1 (ECF No. 63) seeking to recover attorneys' fees and costs incurred for filing the motion to compel  
2 and motion to strike. The application for attorneys' fees and costs requested \$48,617.98 in total  
3 fees and costs. Plaintiffs filed a response requesting that the court significantly reduce the amount  
4 sought. The response indicated that plaintiffs did not dispute the reasonableness of the hourly rate  
5 charged by the lawyers who performed the work for which reimbursement was sought, or that  
6 defendants obtained a favorable result. Rather, plaintiffs disputed the reasonableness of defense  
7 counsel's expenditure of hours arguing that the legal issues presented in the two discovery motions  
8 were not particularly novel or difficult, and that defendants' request for in excess of 170 hours of  
9 combined work performed by 2 partners, 2 associates, and a paralegal was excessive.

10 The response asked the court to significantly reduce the amount sought as sanctions on  
11 several grounds. First, the response argued that some of the claimed charges related to routine  
12 evaluation of documents or inter-office discussion regarding case strategies rather than work on  
13 the two motions at issue. Additionally, some of the charges included multiple tasks blocked into  
14 a single entry, making it difficult to evaluate the reasonableness of the specific charges. Plaintiffs  
15 contend the approximately 57 hours were charged for preparing the motions, and approximately  
16 48 hours for reading plaintiffs' opposition and preparing replies was excessive. Finally, plaintiffs  
17 object to the award of any charges associated with work performed after the first hearing, which  
18 totaled approximately 35 hours. The response noted that the court declined to strike plaintiffs'  
19 supplemental expert report finding it complied with Rule 26 and that any additional objections  
20 were more properly brought as a motion in limine rather than as a discovery motion. Finally,  
21 plaintiffs requested that the court hold an award of attorneys' fees and costs "in abeyance until the  
22 disposition of the case at the trial."

23 Defendants filed a Reply (ECF No. 71) arguing that the plaintiffs had failed to dedicate the  
24 time necessary to satisfy their disclosures and discovery obligations at every step of the litigation.  
25 The failure to timely prepare and serve a Rule 26(a)(2)(B) compliant report effectively resulted in  
26 the court striking its first expert disclosure, and that plaintiffs' failure to spend enough time  
27 satisfying their discovery and disclosure obligations is what led to sanctions in the first place.  
28

1 On the merits of the fee and cost application, defendants argue that plaintiffs' blanket  
2 complaints about the total amount spent were insufficient; that inter-office conferences and  
3 evaluation of documents related to the motions were recoverable; that plaintiffs complaints about  
4 block billing were unfounded; that the time spent traveling to and preparing for attending the  
5 hearings was reasonable and recoverable; and that defendants were entitled to recover their  
6 attorneys' fees and costs incurred after the parties' first hearing. Finally, the reply argued that the  
7 fees and costs awarded should be paid immediately as plaintiffs have cited no authority authorizing  
8 delayed payment of monetary sanctions.

9 The reply requested additional attorneys' fees and costs for a total of \$57,852.48 with  
10 \$56,139 in attorneys' fees, and \$1,713.48 in costs and expenses. This sum includes additional  
11 attorneys' fees and costs incurred relating the parties' jointly submitted, but disputed scheduling  
12 order, drafting the application for attorneys' fees and costs, and reply in support of the request for  
13 an additional 47 hours of work, or \$11,259.50 in attorneys' fees. It also addressed and corrected  
14 an "inadvertent typographical error in this Ms. Beller's August 8, 2016 entry" to reduce the original  
15 application for attorneys' fees requested from \$170.8 hours to 162.7 hours, or \$44, 879.50 in  
16 attorneys' fees.

### 17 **DISCUSSION**

18 The court found that reasonable attorneys' fees and costs would be awarded as a sanction  
19 for the necessity of defendants filing the motion to compel. Sanctions are warranted under both  
20 Fed. R. Civ. P. 37(c)(5)(A) and 37(c)(1). Rule 37(c)(5)(A) mandates sanctions where a motion to  
21 compel has been granted or documents produced after a motion to compel is filed unless: (1) the  
22 moving party filed the motion before attempting to resolve the discovery dispute in good faith; (2)  
23 the opposing party's non-disclosure, response, or objection was substantially justified; or (3) other  
24 circumstances make an award of expenses unjust. The court found that the defendants had  
25 attempted in good faith to resolve the discovery disputes involved in the motion to compel and in  
26 the motion to strike in good faith before filing the motion. The court also found that plaintiffs'  
27 discovery responses and untimely and non-compliant Rule 26(a)(2)(B) expert disclosure were  
28 neither substantially justified or harmless. Plaintiffs do not claim that an award of expenses would

1 be unjust. Rule 37(c)(1) authorizes sanctions for failure to timely comply with the expert  
2 disclosure obligations of Rule 26.

3 The court has carefully reviewed the moving and responsive papers in connection with this  
4 application, the supporting declaration of attorney Northrup, and the attached timesheets  
5 supporting the application. As an initial matter, the court notes that the court denied defendants'  
6 motion to strike plaintiffs' expert, but shifted the costs of taking the expert's deposition to the  
7 plaintiffs, the non-complying party. Thus, although it is undisputed that plaintiffs' initial expert  
8 disclosure was untimely and did not comply with Rule 26(a)(2)(B), the court imposed monetary  
9 sanctions, by cost-shifting, to mitigate the prejudice to the defendants.

10 Defendants' application for attorney's fees and costs initially sought reimbursement for  
11 170.8 hours for total time spent on the motion to compel and motion to strike. The application  
12 requested reimbursement for 30.1 hours of partner time at the rate of \$435/hr., 110.0 hours of  
13 associate time of the primary associated assigned to this case at the rate of \$250/hr., 27.2 hours of  
14 associate at the rate of \$220/hr., and 3.5 hours of paralegal services at the rate of \$210/hr. The  
15 reply reduced the amount of attorneys' fees and costs sought for the motion to compel and motion  
16 to strike to 162.7 hours, for a total of \$44,879.50 in fees, but increased the request for an award in  
17 the amount of \$57,852.48 for the additional time incurred in drafting the application for attorney's  
18 fees and costs and reply.

19 The court finds that the attorneys' fees and costs requested in the current applications are  
20 excessive to impose as a discovery sanction for a number of reasons. As indicated, the court denied  
21 defendants' motion to strike plaintiffs' expert. Instead, the court sanctioned the plaintiffs by  
22 requiring plaintiffs to supplement the expert report with a fully compliant Rule 26(a)(2)(B) expert  
23 report, and incur the costs of preparing for and having the expert attend the deposition, as well as  
24 the court reporter fees and transcript for the deposition. Although the court does not doubt that the  
25 attorney's fees and costs reflected in the timesheets submitted were actually expended, that does  
26 not mean that these attorneys' fees and costs are appropriately awarded as sanctions against the  
27 plaintiffs in favor of the defendants. The Motion to Compel (ECF No. 39) consisted of 18 pages  
28 with the last page consisting of a paragraph conclusion, and supporting exhibits. Half of the motion

1 to compel described the nature of the plaintiffs' claims, and summarized the text of the discovery  
2 requests and responses in dispute. The motion did not raise any novel or difficult legal issues. The  
3 motion to strike was a 21-page document with 75 pages of supporting exhibits. In addition to  
4 arguing plaintiffs' expert should be stricken for failure to comply with their discovery and  
5 disclosure obligations, the motion raised issues regarding the admissibility of the expert's opinions  
6 pursuant to Fed. R. Evid. 702, and on the grounds the expert was purporting to offer inadmissible  
7 legal conclusion testimony.

8         The declaration of attorney Douglas Northrup supporting the application attests that he  
9 reviewed the timekeeping and billing records maintained by the firm, and relates the education and  
10 experience of the timekeepers involved in the attorney's fees and costs for which an award is  
11 sought. The declaration attests that attorneys' fees and costs are sought for a number of legal  
12 services provided on defendants' behalf related to successfully arguing the motion to compel and  
13 motion to strike. Northrup Declaration (ECF No. 63-1, ¶9). Specifically, the application sought  
14 reimbursement for: researching and drafting defendants' motions; (2) researching and drafting the  
15 replies in support of those motions; (3) drafting of two declarations to provide evidentiary support  
16 for defendants' motions; (4) numerous meet and confers relating to plaintiffs' discovery and  
17 disclosure deficiencies; (5) the review of unorganized and duplicative document production to  
18 assess deficiencies in supplementation of plaintiffs' responses after filing of defendants' motions;  
19 (6) investigation relating to plaintiffs' disclosed expert who failed to provide a prior case list; and  
20 (7) preparation for and attendance at two hearings on defendants' motions.

21         As indicated, plaintiffs do not object to the hourly rate sought for the various timekeepers  
22 whose time is reflected in the current application. The hourly rates charges are consistent with  
23 prevailing rates in this district and reasonable. However, the court will not impose the nearly  
24 \$58,000 in fees and costs requested as a sanction for plaintiffs' discovery violations. The court  
25 finds much of the work billed was for tasks that would undoubtedly have been performed whether  
26 or not a motion to compel or motion to strike based on discovery violations was filed. The court  
27 will not sanction plaintiffs for time spent reviewing discovery documents, supplemental responses  
28 or time spent investigating opposing counsel's expert. The court will also not award monetary

sanctions for time spent in meet and confer sessions which are mandatory before a discovery motion may be filed, and would be required whether a not a motion was necessary. The court will also not approve time spent among 5 separate time keepers conferring and reviewing each other's work. Finally, the court will not impose travel time or costs for attending the hearings. Defendants' law firm has offices in Phoenix, Arizona and Las Vegas, Nevada. Although the decision to assign the majority of work in this case to an experienced litigator in the Phoenix office is clearly up to the firm and the client, imposing travel costs as a sanction is not equitable where, as here, the firm has assigned a Las Vegas partner to the case who is actively working and billing for his time on this case. Again, the court emphasizes that it does not doubt that the time requested as sanctions was actually spent, or that counsel reasonably believed the amount of time spent was necessary to defend their clients' interests, only that the amount sought is excessive as a discovery sanction.

Having carefully reviewed the moving and responsive papers, and the timesheets submitted, the court will award a total of \$19,341.76 in attorneys' fees and costs as a sanction for plaintiffs' discovery failures. The court finds that defendants should be reimbursed reasonable attorneys' fees and costs as follows:

Motion to Compel

• 16 hrs. Assoc. Beller (\$250/hr.)	\$4,000.00
• 8 hrs. Assoc. Beller (\$250/hr.) for reply	\$2,000.00
• 2 hrs. Partner Northrup (\$435/hr.) review motion to compel and reply	\$ 870.00
• 2 hrs. Partner Byrd (\$435/hr.) same	\$ 870.00
<b>Total</b>	<b>\$7,740.00</b>

Motion to Strike

• 16 hrs. Assoc. Beller (\$250/hr.)	\$4,000.00
• 8 hrs. Assoc. Beller (\$250/hr.) for reply	\$2,000.00
• 2 hrs. Partner Northrup (\$435/hr.)	\$ 870.00
• 2 hrs. Partner Byrd (\$435/hr.)	\$ 870.00
<b>Total</b>	<b>\$7,740.00</b>



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